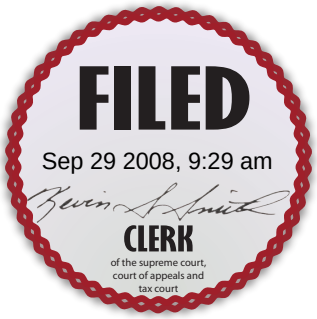

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IN THE COURT OF APPEALS OF INDIANA

MICHAEL WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0805-CR-218
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No.02D04-8905-CF-395

September 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Michael Williams appeals the trial court's denial of his petition for permission to file a belated notice of appeal, contending the trial court erred in denying his petition. Concluding that Williams has failed to show by a preponderance of the evidence that he was entitled to file a belated notice of appeal, we affirm.

Facts and Procedural History

Following a jury trial on December 8, 1989, Williams was convicted of battery, a Class C felony, and sentenced to five years, with two years to be executed at the Indiana Department of Correction and three years to be suspended to probation. Williams did not file a timely direct appeal of his conviction or sentence.

On March 13, 2008, Williams filed a petition for permission to file a belated notice of appeal, alleging that the failure to file a timely notice of appeal was not due to his own fault as he "was informed by counsel to waive his right to appeal [and] say 'NO' when the trial court asked if he wanted an appeal." Appellant's Appendix at 13. Williams further alleged that he was unaware until a fellow inmate informed him on December 27, 2007, that he had the right to seek a belated appeal and that he has thereafter been diligent in requesting permission to file a belated notice of appeal. The trial court denied his petition without a hearing, finding that the record of Williams's battery case indicated that he was "timely advised of his right to appeal his conviction and the assistance of counsel was offered for that purpose." Id. at 22. Williams now appeals.

Discussion and Decision

Although criminal defendants have a state constitutional right to appeal their convictions, the right is not absolute and may be waived by failure to initiate an appeal within the prescribed time. Clark v. State, 506 N.E.2d 819, 821 (Ind. 1987). Indiana Post-Conviction Rule 2(1), however, provides an opportunity for a defendant to petition the trial court for permission to file a belated notice of appeal:

> An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if:
>
> (1) the defendant failed to file a timely notice of appeal;
>
> (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
>
> (3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

Ind. Post-Conviction Rule 2(1)(a). If the trial court finds that the above requirements have been met, "it shall permit the defendant to file the belated notice of appeal. Otherwise, it shall deny permission." P-C.R. 2(1)(c). Because the trial court did not hold a hearing on the petition, we review the case *de novo*.[1] See Cruite v. State, 853 N.E.2d 487, 489 (Ind. Ct. App. 2006) ("Because we are reviewing the same information that was available to the trial court, we owe no deference to its findings."), trans. denied. Williams must prove by a preponderance of the evidence he was not at fault for failing to

[1] Williams contends the trial court erred "in not conducting an evidentiary hearing to afford [him] an opportunity to prove his allegations." Brief of Petitioner-Appellant at 8. Post-Conviction Rule 2(1) does not require a hearing, see P-C.R. 2(1)(d) ("[I]f a hearing is held . . . .") (emphasis added), and our case law acknowledges that our standard of review depends upon whether the trial court holds a hearing, see Moshenek v. State, 868 N.E.2d 419, 424 (Ind. 2007). Although a hearing "should be held where the motion raises a genuine factual dispute concerning the existence of grounds for relief," Hull v. State, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005), there is no such factual dispute here.

file a timely notice of appeal and he was diligent in requesting permission to file a belated notice of appeal. Mead v. State, 875 N.E.2d 304, 307 (Ind. Ct. App. 2007).

Williams contends that the record shows he met the requirements of Post-Conviction Rule 2(1) because the failure to file a timely appeal was due to the fault of his counsel and he has been diligent in requesting to file a belated notice of appeal upon learning that he could do so. Factors to be considered in determining whether the failure to file a timely notice of appeal was not the defendant's fault include the defendant's degree of awareness of his procedural remedy; his age, education, and familiarity with the legal system; whether he was informed of his appellate rights; and whether he committed an act or omission contributing to the delay. Welches v. State, 844 N.E.2d 559, 561 (Ind. Ct. App. 2006). Among the factors relevant to the diligence inquiry are the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties. Moshenek, 868 N.E.2d at 424.

The record in this case shows, and Williams concedes in his brief, that he was advised at his sentencing hearing in December of 1989 of his right to appeal and was offered the assistance of counsel. See Appellant's Appendix at 2 (chronological case summary entry from sentencing hearing stating "Deft advised of right to appeal and indicates he will not appeal"); Brief of Petitioner-Appellant at 3 (stating, in the Statement of Facts, that the "Trial Court adequately inform [sic] Williams that he could appeal the sentencing and in fact instructed Williams that failure to timely file either the motion to correct errors or the praecipe will result in a forfeiture of your right to

appeal."); id. at 8 ("Here, the trial court denied the petition stating [that Williams was timely advised of his right to appeal and assistance of counsel was offered for that purpose]. While that is true . . . ."). The record also shows that although Williams's trial counsel advised him that an appeal would be "a waste of time," he nonetheless told Williams that it was his decision and that if he changed his mind, he had to tell counsel before January 7, 1990.[2]

Because Williams acknowledges that he was timely advised of his right to appeal and was offered the assistance of counsel, who advised him of the time limitations for initiating an appeal, he has not shown by a preponderance of the evidence that the failure to timely file a notice of appeal was not his fault. Cf. Moshenek, 868 N.E.2d at 424 ("The fact that a trial court did not advise a defendant about [his] right [to appeal] can establish that the defendant was without fault in the delay of filing a timely appeal.").

As for showing diligence, Williams alleges that he was not aware of his right to file a belated appeal until December 27, 2007,[3] and was diligent in requesting permission to file a belated notice of appeal after that date. The question is not when Williams became aware of the opportunity to seek permission to file a belated notice of appeal, but when he became aware of his right to appeal. Williams was sentenced in December 1989 and was advised at that time of his right to appeal. Therefore, he was

[2] Williams contends that although he was timely advised of his right to appeal, he suffers from a learning disability "that made it impossible to understand the proceedings." Brief of Petitioner-Appellant at 8. However, Williams's petition for permission to file a belated notice of appeal does not mention a learning disability. Generally, a party may not raise an issue on appeal that was not raised first in the trial court. Ross v. State, 704 N.E.2d 141, 143 (Ind. Ct. App. 1998).

[3] Williams contends that on that date, a fellow inmate gave him a copy of Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004), in which our supreme court held that an individual who pleads guilty in an "open plea" must challenge the sentence imposed on direct appeal if at all. Because Williams was found guilty following a jury trial, rather than pursuant to a guilty plea, it is unclear what impact he thinks Collins has on his own case.

aware at the outset of the thirty-day time frame for filing a timely notice of appeal and for nearly twenty years prior to filing his petition for permission to file a belated notice of appeal that he had a right to appeal. Under these circumstances, we cannot say that Williams has shown by a preponderance of the evidence that he was diligent in requesting permission to file a belated notice of appeal. See id. ("It was not clearly erroneous for the trial court to determine that an eleven-year span without any effort to raise a sentencing claim showed a lack of diligence in pursuing a belated appeal.").

Conclusion

Williams has failed to prove that he was without fault in failing to file a timely appeal and acted with diligence in seeking permission to file a belated notice of appeal. The trial court did not err in denying his petition.

Affirmed.

NAJAM, J., and MAY, J., concur.